SEMANTAN ESTATE (1952) SDN BHD
v. KERAJAAN MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD KAMAL MD SHAHID J
[JUDICIAL REVIEW NO: WA-25-44-02-2017]
28 FEBRUARY 2022

Abstract – *The issuance of an order of mandamus is strictly a matter of court's discretion. To ascertain whether it is proper or not to grant remedy, the court is entitled to take into consideration of not only the conduct of the applicant but also the surrounding circumstances of the case. In this land matter, although an order of mandamus could be legally issued, the court did not grant such order to compel the respondents to materialise extensive reliefs which the applicant prayed for as this was an impossible task for the respondent to perform as the land in dispute had been developed.*

ADMINISTRATIVE LAW: *Judicial review – Application for – Application for orders of mandamus to compel compliance of court order – Whether applicant had clear and specific legal right to reliefs sought – Whether applicant had any remedy other than by way of mandamus for enforcement of right which had been denied – Whether mandamus order ought to be issued – Whether issuance of mandamus order would cause undue hardship*

This was an application for judicial review filed by the applicant under O. 53 of the Rules of Court 2012 ('ROC') for orders of *mandamus* against the respondents to compel them to comply with a High Court order, specifically (i) to give effect to the judgment where it was ordered ('pronouncement') that: (a) the applicant retained its beneficial interest in 263.272 acres of a land of which the first respondent had taken unlawful possession of; (b) the first respondent do pay the applicant mesne profits as damages for trespass, the said damages to be assessed by the Senior Assistant Registrar; and (c) that the first respondent to pay the applicant costs in respect of liability forthwith; (ii) to transfer 263.272 acres of land to the applicant, free of encumbrances and liabilities, including but not limited to registering the applicant as the proprietor of the land; (iii) to register the applicant as the proprietor of the land, free of encumbrances and liabilities; (iv) to execute all instruments of transfer necessary to effect a transfer of the land free of encumbrances and liabilities to the applicant; (v) to issue the issue document of title to the land free of encumbrances and liabilities in the name of the applicant; (vi) to prepare, change, cancel, delete and/or amend the relevant register document(s) of title, issuing document(s) of title or any other register or instrument relating to the land, including any memorial or entry in the

relevant register of titles and documents to vest the registered proprietorship in the land free of encumbrances in the name of the applicant; and (vii) to return and to make all necessary directions, arrangements, preparations and/or to take all necessary actions in respect of returning and handling over possession of the land to the applicant as the lawful proprietor and owner of the land. The applicant company was placed in a members' voluntary liquidation and two joint liquidators were appointed by the High Court. The events that led to the present application were these: (i) back in the 1950s, 225 acres of the land belonging to the applicant held under Title No. CT12530 was declared to be acquired for a diplomatic enclave; (ii) the Collector of Land Revenue ('Collector') held an inquiry and affixed compensation at RM5,282 per acre, awarding a total amount of RM1,320,500 to the applicant; (iii) the Collector then took possession of the land and the applicant received the payment of the award under protest, objecting to the sufficiency of the award. The objection was referred to the High Court; and (iv) the Government of Selangor withdrew acquisition of 22 acres acquired. The total area now acquired was approximately 263 acres. The Collector, however, admitted that the award of compensation was invalid and that the inquiry held earlier was a nullity. The applicant's land reference was heard but the High Court was of the view that it did not have the jurisdiction to entertain the reference. The Ruler-in-Council granted the land to the Federal Land Commissioner ('FLC') and thereafter, 38 separate titles were issued and registered in the name of the FLC. The applicant commenced a judicial review proceeding to compel the Collector to hold an inquiry and determine the amount of compensation to be paid in respect of the acquisition of the 263.272 acres. The application was dismissed. The applicant then commenced a civil action against the first respondent and action was allowed where the pronouncement was made ('judgment dated 29 December 2009') and later affirmed by the Court of Appeal and the Federal Court.

Held (dismissing application):

(1) Based on the background facts of the present case in which the applicant had been declared as the proprietor of the land and mesne profit being assessed by the Senior Assistant Registrar under the judgment dated 29 December 2009, which was later affirmed by the Court of Appeal and the Federal Court, showed that the applicant had a clear and specific legal right to the reliefs sought. The judgment dated 29 December 2009 had not been complied with even though this issue was finally determined and decided by the Federal Court. (paras 43 & 44)

(2) Taking into account the surrounding circumstances in the present case, it was in the interest of justice that registering the applicant as the proprietor of the land, having possession of the land as the original proprietor, would not meet the ends of justice taking into account that the land had been acquired to develop a diplomatic enclave which had

benefitted the public at an enormous rate. The court order compelling the respondents to prepare, change, cancel, delete and/or amend the relevant register document(s) of title, issuing document(s) of title or any other register or instrument relating to the land, including any memorial or entry in the relevant register of titles and documents to be the registered proprietorship in the land free of encumbrances in the name of the applicant would cause undue hardship to the respondents which compensation may be insufficient. Even though it appeared that a legal *mandamus* order may be granted, this case required further consideration that had to be carefully made. What would happen to the land that had been substantially developed over the years if the *mandamus* order was granted? If the applicant was allowed to register the beneficial interest as well as a proprietor of the land that they were entitled to possess from the first respondent, then the development of the land as diplomatic enclave would stand frustrated. If the applicant asserted its rights as the registered proprietor of the land having possession of the same, then it would greatly affect the development of the land and further cause enormous loss of public money. Therefore, this was not an appropriate case and situation where a *mandamus* order could be granted. Justice was far beyond what the applicant was seeking. Reinstating the beneficial interest, as well as possession of the applicant in the land, would be unfair to the respondents, taking into account that the land had been substantially developed. Reinstating proprietorship of the land to the applicant would cause grave injustice. (paras 101-106)

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Chin Mee Keong & Ors v. Pesuruhjaya Sukan [2007] 5 CLJ 363 CA ***(refd)***

Dewan Perniagaan Melayu, Malaysia Negeri Johor v. Menteri Besar Johor & Ors [2017] 10 CLJ 632 HC ***(refd)***

Eu Finance Bhd v. Lim Yoke Foo [1982] 1 LNS 21 FC ***(refd)***

Government Of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***

Hock Huat Chan Sdn Bhd v. Assan Mohammad & Ors [2008] 4 CLJ 512 HC ***(refd)***

Indira Ghandhi Mutho v. Ketua Polis Negara [2016] 5 CLJ 353 FC ***(refd)***

Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA ***(refd)***

Lee Mok Lan v. Registrar Of Titles, Selangor [1955] 1 LNS 48 HC ***(refd)***

Lim Kit Siang v. Dato' Seri Dr Mahathir Mohamad [1986] 2 CLJ 441; [1986] CLJ (Rep) 462 HC ***(refd)***

Manggai v. Government Of Sarawak & Anor [1970] 1 LNS 80 FC ***(refd)***

Menteri Kewangan & Anor v. Wincor Nixdorf (M) Sdn Bhd [2016] 6 CLJ 215 CA ***(refd)***

Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd [2008] 5 CLJ 321 FC ***(refd)***

Orchard Circle Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Ors [2021] 1 CLJ 1 FC ***(refd)***

Peguam Negara Malaysia v. Dr Michael Jeyakumar Devaraj [2011] 9 CLJ 645 CA ***(refd)***

Pemungut Hasil Tanah, Daerah Barat Daya (Balik Pulau), Pulau Pinang v. Kam Gin Paik & Ors [1983] 1 LNS 37 FC ***(refd)***

A *Rosli Dahlan v. Tan Sri Abdul Gani Patail & Ors [2014] 9 CLJ 225 HC* ***(refd)***
Semantan Estate (1952) Ltd v. Collector Of Land Revenue [1960] 1 LNS 124 HC ***(refd)***
Semantan Estate (1952) Sdn Bhd v. Collector Of Land Revenue Wilayah Persekutuan [1987] 2 CLJ 199; [1987] CLJ (Rep) 329 SC ***(refd)***
Semantan Estate (1952) Sdn Bhd v. Kerajaan Malaysia & Ors [2021] 8 CLJ 627 CA ***(refd)***
Tang Hak Ju v. Ketua Menteri Negeri Pulau Pinang & Ors [2010] 1 CLJ 993 CA ***(refd)***
B *Tasja Sdn Bhd v. Golden Approach Sdn Bhd [2011] 3 CLJ 751 FC* ***(refd)***
The State Minerals Management Authority, Sarawak & Ors v. Gegah Optima Resources Sdn Bhd [2020] 6 CLJ 279 CA ***(refd)***
Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal [2020] 1 CLJ 337 FC ***(refd)***
C *United Allied Empire Sdn Bhd v. Pengarah Tanah Dan Galian Selangor & Ors [2017] 8 CLJ 173 CA* ***(refd)***
Workon Sdn Bhd v. The Director Of Lands And Surveys, Sabah & Ors [1999] 1 LNS 40 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 25(4), Schedule para 1
D Federal Constitution, art. 13
Government Proceedings Act 1956, s. 29(1)
Government Proceedings Ordinance 1956, s. 29
Limitation Act 1953, ss. 6(1), 9(1)
National Land Code, s. 417(1)
Public Authorities Protection Act 1948, s. 2(a)
E Rules of Court 2012, O. 53
Rules of the High Court 1980, O. 18 r. 19, O. 53
Specific Relief Act 1950, ss. 8(1), (3), 44

Other source(s) referred to:
Janab's Key to Civil Procedure, 5th edn, pp 440-454

F *For the appellant - Ira Biswas, Janet Chai Pei Ying & Christine Lay Kei Een; M/s Chooi & Company + Cheang & Ariff*
For the respondents - Narkunavathy Sundareson; SFC & Noor Atiqah Zainal Abidin; FC

Reported by Lina E

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JUDGMENT

Ahmad Kamal Md Shahid J:

Introduction

H **[1]** On 27 February 2017, the applicant filed a notice of application for judicial review under O. 53 of the Rules of Court 2012 (ROC), for this court to grant a *mandamus* order against the first respondent to seventh respondent to compel the respondents to comply with the High Court Order dated 29 December 2009 *vide* Civil Suit No. S7-21-213-2003.

I **[2]** The order of the High Court in Civil Suit No. S7-21-213-2003 is reproduced as follows:

UPON the action being adjourned to the 29th day of December 2009 for delivery of judgment AND UPON the action being called up for delivery of judgment on the 29th day of December 2009 in the presence of Ira Biswas (Janet Chai Pei Ying with her) of counsel for the Plaintiff and Najwa Bistamam, Federal Counsel, for the Defendant, IT IS THIS DAY ADJUDGED as follows:

1. The Plaintiff retained its beneficial interest in the 263.272 acres of the land held under CT 17038 Mukim of Batu (formerly part of the land known as Lot 4647 comprised in C.T 12530) of which the Defendant has through its servants and/or agents taken unlawful possession of and that the Plaintiff is entitled as against the Defendant to possession thereof;

2. That the Defendant do pay the Plaintiff mesne profits as damages for trespass, the said damages to be assessed by the Senior Assistant Registrar;

3. That the Defendant do pay the Plaintiff costs in respect of liability forthwith.

Dated this 29th day of December 2009.

KAVEETHA A/P ARMUGEM

[3] It is to be noted that leave for judicial review in this present case was granted on 13 May 2019 by YA Dato' Nordin bin Hassan (now JCA). The applicant in this present case is now seeking the following prayers:

(i) An order of *mandamus* to compel the respondents to take and cause all necessary steps to be taken to give effect to that part of the judgment by the Honourable Judicial Commissioner Puan Zura binti Yahya (as she then was) dated 29 December 2009 *vide* High Court Civil Suit No S7-21-213-2003 (the judgment) that orders as follows:

> The Plaintiff retained its beneficial interest in the 263.272 acres of the land held under CT 17038 Mukim. of Batu (formerly part of the land known as Lot 4647 comprised in C.T 12530) of which the Defendant has through its servants and/or agents taken unlawful possession of and that the Plaintiff is entitled as against the Defendant to possession thereof;

(ii) An order(s) of *mandamus* to compel the respondents to:

(a) Transfer and cause to be transferred the 263.272 acres of land under CT 17038 Mukim of Batu (the land) to the applicant free of encumbrances and liabilities, including but not limited to registering the applicant as the proprietor of the land;

(b) Take and cause all necessary steps to be taken to register the applicant as the proprietor of the land, free of encumbrances and liabilities;

(c) Execute and cause to be executed all instruments of transfer necessary to effect a transfer of the land free of encumbrances and liabilities to the applicant;

(d) Issue and cause to be issued the issue document of title to the land free of encumbrances and liabilities in the name of the applicant;

(e) Prepare, change, cancel, delete, correct, and/or amend the relevant register document(s) of title, issuing document(s) of title or any other register or instrument relating to the land, including any memorial or entry in the relevant register of titles and documents to vest the registered proprietorship in the land free of encumbrances in the name of the applicant; and

(f) Return, cause to be returned and make all necessary directions, arrangements, preparations and/or take all necessary action in respect of returning and handing over possession of the land to the applicant as the lawful proprietor and owner of the land.

[4] After the hearing, I dismissed the applicant's application (encl. 17). The reasons for the decision are set down as below.

Background Facts

[5] The applicant is a company incorporated in Malaysia having a registered address for service at the 9th Floor, Bangkok Bank Building, Jalan Bandar, Kuala Lumpur. The applicant has been placed in a members' voluntary liquidation since 27 July 1982. On 18 August 2015, two joint liquidators were appointed by High Court.

[6] This case has a long history of litigation between parties. The events that led to the present application are these. Back in the 1950s, according to a *Gazette* Notification No. 401 dated 20 July 1956 (GN 401/56) 225 acres of the land belonging to the applicant was held under Title No. CT12530, *ie*, the land, was declared to be acquired for a diplomatic enclave.

[7] Pursuant to the provisions of the Land Acquisition Enactment (Cap 140), the Collector of Land Revenue held an inquiry to determine the amount of compensation payable in respect of the acquisition. The applicant claimed for a compensation of RM13,000 per acre.

[8] On 27 November 1956, the Collector of Land Revenue affixed compensation at RM5,282 per acre for the 250 acres and awarded a total amount of RM1,320,500 to the applicant. (Please refer to the submission of the respondents encl. 81 in para. 4).

[9] On 3 December 1956, the Collector of Land Revenue took possession of the 250 acres of the said land. The applicant received the payment of the award under protest. The applicant objected to the sufficiency of the award and requested that the objection be referred to the court.

[10] Subsequently the Government of Selangor notified by *Gazette* Notification No. 61 dated 22 January 1958 (GN 61/58) and No. 117 dated 25 February 1958 (GN117/58), that they withdrew acquisition of 22 acres acquired an area measuring 60 acres, 2 roods and 27.5 poles of CT 12530 for extensions to the diplomatic enclave. The total area now acquired was approximately 263 acres.

[11] *Vide* letter dated 3 May 1958, the collector admitted that the award of compensation was invalid and that inquiry dated 27 November 1956 was a nullity.

[12] *Vide* letter dated 1 August 1958, the parties agreed that all procedural matters should be settled in the following manner:

(i) It will be accepted that the whole of the area now taken by the Government was acquired under GN401/56;

(ii) It is accepted as a basis of all future proceedings that the award made by the collector in respect of acquisition was at the rate of RM5,282 per acre and the applicant claimed at the rate of RM13,000 per acre;

(iii) Further compensation at the rate of RM5,282 was paid for the additional 13,272 acres; and

(iv) The second acquisition proceedings should be withdrawn by the Government and should be treated by both sides as never having occurred.

[13] The applicant's land reference in the Kuala Lumpur High Court and reported as *Semantan Estate (1952) Ltd v. Collector Of Land Revenue* [1960] 1 LNS 124; [1960] 1 MLRH 471; [1960] MLJ 300 *(Semantan No. 1)* was heard before Ong J (as he then was) who was of the view that the court does not have jurisdiction to entertain the reference as it was not based upon the award made on 27 November 1956.

[14] On 18 February 1963, the Ruler-in-Council granted the land to the Federal Land Commissioner and thereafter 38 separate titles were issued and registered in the name of the Federal Land Commissioner.

[15] Sometime in the year 1958, the applicant commenced a Judicial Review proceeding to compel the Collector of Land Revenue to hold an inquiry and determine the amount of compensation to be paid in respect of the acquisition of 263.272 acres.

[16] The application was dismissed which can be seen in the reported case of *Semantan Estate (1952) Sdn Bhd v. Collector Of Land Revenue Wilayah Persekutuan* [1987] 2 CLJ 199; [1987] CLJ (Rep) 329; [1987] 1 MLRA 140; [1987] 2 MLJ 346 *(Semantan No. 2).*

[17] The applicant then commenced a civil action against the first respondent in the Kuala Lumpur High Court *vide* Civil Suit No. S7-21-213-2003.

[18] After full trial and on 29 December 2009, the learned Judicial Commissioner, Puan Zura binti Yahya (as she then was) allowed the applicant's claim and pronounced the following orders:

(i) The plaintiff retained its beneficial interest in the 263.272 acres of the land held under CT 17038 Mukim of Batu (formerly known as Lot 4647 comprised in CT 12530) of which the defendant has through its servants and/or agents taken unlawful possession of and that the plaintiff is entitled as against the defendant to possession thereof;

(ii) That the defendant do pay the plaintiff mense profits as damages for trespass, the said damages to be assessed by the Senior Assistant Registrar; and

(iii) That the defendant pays the plaintiff costs in respect of liability forthwith.

[19] Dissatisfied with the High Court order dated 29 December 2009, the first respondent appealed against the High Court decision to the Court of Appeal. On 18 May 2012, the Court of Appeal dismissed the appeal with costs of RM30,000.

[20] The Court of Appeal held that, *inter alia,* there was no valid award in relation to the 263.272 acres of land and the first respondent had not acquired the land from the appellant lawfully. In effect, the applicant submitted that the first respondent is a trespasser.

[21] The first respondent appealed to the Federal Court against the decision of the Court of Appeal. On 21 November 2012, the first respondent's application for leave to appeal to the Federal Court was dismissed with a cost of RM10,000.

[22] The first respondent further filed an application to the Federal Court for a review of the dismissal of its leave application. On 22 November 2018, the review application was also dismissed with costs. The assessment of damages is still pending in the High Court.

Judicial Review

[23] The law on judicial review is rather trite in that there are three classifications of grounds on which administrative action is subject to control by judicial review. The Court of Appeal in the case of *United Allied Empire Sdn Bhd v. Pengarah Tanah Dan Galian Selangor & Ors* [2017] 8 CLJ 173; [2018] 1 MLJ 661; [2018] 4 MLRA 400; [2017] 5 AMR 555 held as follows:

> [17] The law on JR is rather trite. Case law authorities have developed, by leaps and bounds, in this important area in the public law sphere. It is now beyond dispute that a decision made in exercise of public duty or

function is susceptible to be quashed on recognised grounds by way of a JR application, as enunciated by Lord Diplock in the celebrated House of Lords decision in the case of *Council of Civil Service Unions v. Minister for the Civil Servic*e [1983] UKHL 6 ('the *CCSU*'s case'). The learned Law Lord had opined as follows:

> Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call **'illegality', the second 'irrationality' and the third 'procedural impropriety'.** That is not to say that further development on a case by case basis may not in the course of time add further grounds. I have in mind particularly the possible adoption in the future of the **principle of 'proportionality'** which is recognised in the administrative law of several of our fellow members of the European Economic Community. (emphasis added)

[24] On the facts, it has been settled that the said land was unlawfully and illegally acquired by the first respondents. As such the said land vested on the first respondent is not free from encumbrances. This falls under one of the grounds on which administrative action is subject to control by judicial review.

The Decision Of The Court

[25] In determining whether the applicant's application should be allowed in the present case, reference must first be made as to the meaning of *mandamus* order and the requirements that the applicant must fulfil before an order of *mandamus* may be granted by this court.

[26] *Mandamus* is a Latin term for "we order" which orders a public agency or governmental body to perform an act required by law when it has neglected or refused to do so. The order cannot issue when the right is doubtful or is a qualified one or where it depends upon an issue of fact to be determined by the public officer(s).

[27] The area of *mandamus* application is well settled in the case of *Workon Sdn Bhd v. The Director Of Lands And Surveys, Sabah & Ors* [1999] 1 LNS 40; [1999] 6 MLRH 770; [1999] 4 MLJ 177 wherein Richard Malanjum J (as he then was) held as follows:

> [12] It is settled law that *mandamus* lies to secure the performance of a public duty in which an applicant has sufficient legal interest to the performance. The duty to be performed must be of a public nature such as duty imposed by statute, custom, common law and even contract, (see: *Padfield v. Minister of Agriculture, Fisheries and Foods* (1968) AC 997). Thus, where a statute imposes a duty, the performance or non-performance of which is not a matter of

discretion, an order of *mandamus* may be issued. But if a power or discretion only, as distinct from a duty, exists an order of *mandamus* will not be granted by the court except to secure performance of a duty to exercise the discretion as may be necessary, or a duty to exercise a genuine discretion or a discretion based on proper legal principles, (see: *R v. Port of London Authority, ex p Kynock Ltd.* (1919) 1 KB 176, CA; *Judicial Review* by Michael Supperstone QC and James Goudie QC page 307). Further, it does not cover duty in relation to a matter of a private nature or character nor does it extend to the performance of a mere moral duty.

[13] An applicant for an order of *mandamus* must show that he has demanded performance of the duty and the authority or public official obliged to discharge it has refused that performance. There must be a distinct and specific demand or request to the authority or public official that it or he performs the duty imposed upon it or him. And there must be an unequivocally manifested refusal to comply with the demand or request on the part of the authority or public official. Where there is no obvious indication that there is a refusal it is a question of fact whether such conduct tantamount to a clear determination not to comply with the demand or request. However, delay in complying with the demand or request or indicating that compliance would be subject to unreasonable or unlawful conditions or a failure to give a direct answer to the demand or request may amount to refusal, (see: *R v. Tower Hamlets L.B.C., ex p. Kayne-Levenson* (1975) QB 431).

[28] The grant or refusal of *mandamus* order against public authorities or governmental body is governed under three pieces of legislation which includes s. 44 of the Specific Reliefs Act 1950 (SRA 1950), para. 1 of the Schedule to the Courts of Judicature Act 1964 (CJA 1964) and O. 53 of the ROC.

[29] The provision of s. 44 of the SRA 1950 is as follows:

Section 44 of the Specific Relief Act 1950

Power to order public servants and others to do certain specific acts

44(1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:

Provided that:

(a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

(c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

(e) the remedy given by the order applied for will be complete.

(2) Nothing in this section shall be deemed to authorize a Judge:

(a) to make any order binding on the Yang di-Pertuan Agong;

(b) to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government; or

(c) to make any order which is otherwise expressly excluded by any law for the time being in force.

[30] The provision of para. 1 of the Schedule to the CJA 1964 is as follows:

Prerogative writs

1. Power to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

[31] The provision of O. 53 of the ROC is as follows:

Application for judicial review (O. 53, r. 1)

1. (1) This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.

(2) This Order is subject to the provisions of Chapter VIII of Part 2 of the Specific Relief Act 1950 [Act 137].

Applications (O. 53, r. 2)

2. (1) An application for any of the reliefs specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application for an order of *habeas corpus*) shall be in Form 109.

(2) An application for judicial review may seek any of the reliefs, including a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.

(3) Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation:

Provided that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1956 [Act 359] and section 54 of the Specific Relief Act 1950.

(4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

[32] It is clear and well-settled law that the superior courts have the inherent power in the interest of justice to grant *mandamus* order against the Government.

[33] In *Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321; [2008] 4 MLJ 641; [2008] 1 MLRA 705, Abdul Hamid Mohamad CJ (as he then was) stated that it is the statutory duty of the Government to make payment to the respondent where the respondent had already obtained a judgment against the Government. At paras. 31 to 35, Abdul Hamid Mohamad CJ (as he then was) stated this:

[31] Paragraph 1 of the Schedule of the CJA itself provides that *mandamus* may be issued 'for the enforcement of rights conferred by Part II of the Constitution, or any of them ...' .

[32] Article 13 which is the last article in Part II of the Federal Constitution provides:

(1) No person shall be deprived of property save in accordance with law.

[33] In other words, *mandamus* may issue for the purpose of enforcing the right of a person who has been deprived of his property not in accordance with law. Here, the respondent has obtained a judgment. There is a judgment debt owed to him. Payment has not been made. Upon obtaining the certificate, it becomes a statutory duty of the State Government of Sabah to make payment. By not paying, clearly the State Government of Sabah has deprived the respondent of its property contrary to law.

[34] Furthermore, para 1 of the Schedule of the CJA goes on to provide 'or for any purpose'. This is even wider.

[35] It is, therefore, clear to me that *mandamus* lies against the appellant.

[34] In the same case, Arifin Zakaria FCJ (as he then was) held that a *mandamus* order may be issued against the Government to enforce compliance with judgment sum as it is a statutory duty to the Government to do so. In para. 76 of the judgment, Arifin Zakaria FCJ (as he then was) stated that:

[76] The appellant in the present case, as the Minister in charge of financial matters for the state is naturally responsible for the payment of the judgment sum. An order of *mandamus* may, in the circumstances, be issued to enforce such a compliance by the

appellant. This proposition flows from the judgment of Lord Denning in *Franklin v. The Queen*, where the judgment creditor took out a summons under O. 48 of the English RSC to examine the relevant officer of the Government of Southern Rhodesia to determine the financial resources available to the government to satisfy his judgment. Shaw J set aside the order of the master granting such leave on the premise that it was barred by the English equivalent of our O. 72 r. 12 and his decision was affirmed by the Court of Appeal.

And at para. 81:

[81] From the above, the position in law is that, there is a duty on the part of the government to pay the amount stated in the certificate issued under s. 33(3) of the GPA to the respondent. It is not a matter of discretion for the government whether to pay or not to pay. As a statutory duty it is of course binding on the state government. And it is incumbent upon the court to give effect to such statutory duty and if necessary through the coercive force of the order of *mandamus*.

[35] In *Peguam Negara Malaysia v. Dr Michael Jeyakumar Devaraj* [2011] 9 CLJ 645; [2012] 1 MLJ 179; [2012] 1 MLRA 157, Low Hop Bing JCA (as he then was) in delivering the judgment succinctly set out the requirements before an order of *mandamus* may be granted by the court as stated below:

[27] The law governing the grant or refusal of an order of *mandamus* is to be gathered from three pieces of legislation. More specifically, the relevant provisions are contained in:

(a) Section 44;

(b) Para 1 of the Schedule to the Courts of Judicature Act 1964 ('the Schedule');

(c) O. 53

(see eg *Hong Leong Equipmen*t).

[29] In an application for an order of *mandamus*, these five conditions are cumulative. All of them must be satisfied. In *Koon Hoi Chow*, Sharma J enunciated the following principles:

(a) An order under s 44 is in its nature an order of *mandamus*. It is a peremptory order of the Court commanding somebody to do that which it was his clear legal duty to do. The applicant seeking such an order must have a legal right to the performance of such duty by the person against whom the order is sought;

(b) The prerequisites essential to the issue of an order under s. 44 or of *mandamus* are:

(i) *whether the applicant in the High Court has a clear and specific legal right to the relief sought;*

(ii) *whether there is a duty imposed by law on the public officer(s);*

(iii) whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the public officer(s); and

(iv) *whether the applicant has any remedy, other than by way of mandamus for the enforcement of the right which has been denied to him.*

(c) *These are the questions, but only some of the questions, which are necessary to be answered in every application for mandamus. The applicant must show not only that he has a legal right to have the act performed but that the right is so clear and well defined as to be free from any reasonable controversy.* The order cannot issue when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the public officer(s).

(emphasis added)

[36] Applying the questions that were considered by the Court of Appeal in the case of *Peguam Negara Malaysia* (*supra*) to this present case, questions (i) and (iv) are of particular relevance to be considered and answered in the following paragraphs below.

Question (i) Whether The Applicant In The High Court Has A Clear And Specific Legal Right To The Relief Sought?

[37] The applicant has filed an application for judicial review for an order that the first respondent to the seventh respondent perform an act including registering or causing the registration of the applicant as the proprietor of the said land as it is settled that the applicant retains the beneficial interest as well as possession of the said land under the High Court Order No. 1 and the payment of the mesne profit which is to be assessed by the Senior Assistant Registrar under Order No. 2.

[38] The applicant has filed an application for a rather clear and straightforward relief *inter alia*; to compel the first to the seventh respondents to take and cause all necessary steps to be taken to give effect to that part of the judgment by the Honourable Judicial Commissioner Puan Zura binti Yahya (as she then was) dated 29 December 2009 *vide* High Court Civil Suit No. S7-21-213-2003 wherein the first to the seventh respondents each perform their official functions to give effect to the said judgment.

[39] At first glance of the judgment dated 29 December 2009, it is clear that the learned Judicial Commissioner has acknowledged and ordered that the applicant/plaintiff in High Court Civil Suit No. S7-21-213-2003 retained its beneficial interest in the 263.272 acres of the land held under CT 17038 Mukim of Batu (formerly part of the land known as Lot 4647 comprised in CT 12530) of which the respondents/defendants has through its servants and/or agents taken unlawful possession of and that the applicant/plaintiff is entitled as against the respondents/defendants to possession thereof.

[40] This has been determined and disposed of until the Federal Court during the dismissal of the first respondent's leave to appeal to the Federal Court on 21 November 2012, and the review application on 22 November 2018.

[41] Thus, the applicants present application of *mandamus* order is very clear in that the registration of the applicant as proprietor having retained the beneficial interest in the 263.272 acres of the land held under CT 17038 Mukim of Batu (formerly part of the land known as Lot 4647 comprised in CT 12530) of which the respondents/defendants has through its servants and/or agents took unlawful possession of and that the applicant/plaintiff is entitled as against the respondents/defendants to possession thereof and the consequential orders that follows reflecting the 2009 judgment despite the land might have been developed over the year of a dispute between parties.

[42] This is further strengthened by the recent Court of Appeal case of *Semantan Estate (1952) Sdn Bhd v. Kerajaan Malaysia & Ors* [2021] 8 CLJ 627; [2021] MLRAU 141; [2021] 4 MLJ 838 which held as follows:

> [42] As alluded to earlier the judgment of the High Court has pronounced and ordered that the Appellant *retained its beneficial interest in the land* of which the 1st Respondent had through its servants and/or agents taken unlawful possession of and that the appellant was entitled as against the 1st Respondent to possession thereof. *Rightly, the applicant has a legal right to compel the performance of the 1st Respondent's public duty under the law to hand possession over the land and/or register the Applicant as the proprietor of the said land* ...
>
> (emphasis added)

[43] As such, based on the background facts of this present case wherein which the applicant has been declared as the proprietor of the said land and mesne profit being assessed by the Senior Assistant Registrar under the High Court Order dated 29 December 2009 which was later affirmed by the Court of Appeal and the Federal Court clearly shows that the applicant in this present case has a clear and specific legal right to the reliefs sought under Order No. 1, 2 and 3 arising from the High Court Civil Suit No. S7-21 -213-2003.

Question (iv) Whether The Applicant Has Any Remedy, Other Than By Way Of Mandamus For The Enforcement Of The Right Which Has Been Denied To Him?

[44] On the facts of the case, the judgment against the first respondent dated 29 December 2009 arising from the High Court Civil Suit No. S7-21-213-2003 has not been complied with even though this issue was finally determined and decided by the Federal Court on 22 November 2018 when the first respondent's judicial review application was dismissed by the Federal Court.

[45] It is of great importance to note that the *mandamus* order will not be granted where there is an alternative remedy available. This was raised in the respondents' written submission (encl. No. 81) wherein the respondents cited and relied on the several authorities including the case of *Semantan No. 2* (*supra*) where Lee Hun Hoe J (as he then was) at p. 349 held that where the right or liability is created by statute which gives a special remedy for enforcing it, *mandamus* was refused.

[46] The respondent also relied on the case referred by Justice Lee Hun Hoe which includes *Manggai v. Government Of Sarawak & Anor* [1970] 1 LNS 80; [1970] 1 MLRA 344; [1970] 2 MLJ 41, where the Federal Court held that no declaratory judgment could be made where there was an alternative remedy and that he could not use the procedure relating to the declaration but should use the procedure laid down relating to appeal to the Native Court of Appeal.

[47] However, I am of the view that the case of *Manggai* (*supra*) ought to be distinguished from this present case. In *Manggai* (*supra*), the appellant sought a declaration against the decision of the resident's court instead of appealing to the native Court of Appeal. In contrast, the applicant in this present case has filed an application to sought a declaration against the first to the seventh respondents that the applicant is the beneficial title to the said land and to compel the respondents to perform Order No. 1, 2 and 3 as seen in the High Court judgment dated 29 December 2009.

[48] It was not a situation where appeal needs to be filed taking into account that there was the deliberate delay and disobedience of the first respondent (and the second to the seventh respondents) in complying with the said High Court order dated 29 December 2009 in the High Court Civil Suit No. S7-21-213-2003.

[49] As such, it appears that it is only just, fair and reasonable that a *mandamus* order to be granted against the first to the seventh respondents for their disobedience in performing their duties provided under the High Court order dated 29 December 2009 even though it has been finally determined on 22 November 2018.

[50] Furthermore, a *mandamus* order would also be awarded in situations where there is constant disobedience as seen in the case of *Menteri Kewangan & Anor v. Wincor Nixdorf (M) Sdn Bhd* [2016] 6 CLJ 215; [2016] 4 MLRA 419; [2016] 4 MLJ 621; [2016] 3 AMR 533. in that case, the Court of Appeal opined that the remedy in the nature of *mandamus* is drastic and generally it is only invoked in extraordinary situations after the courts have been satisfied that the applicant has exhausted all other avenues available to him (see *Janab's Key to Civil Procedure* (5th edn) pp. 440-454).

Public Authorities Protection Act 1948

[51] The respondents in objecting to the applicant's application raised the issue of nullity on the grounds that the limitation period for this present complaint giving rise to a legal cause of action against the first respondent would have been extinguished by 20 February 1966 and the applicant is time barred under s. 2(a) of the Public Authorities Protection Act 1948 (PAPA 1948).

[52] For ease of reference s. 2(a) of the PAPA 1948 is hereinafter reproduced below:

> **Protection of persons acting in execution of statutory or other public duty**
>
> 2. Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, **in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof.** (emphasis added)

[53] The respondent relied on the cases of *Tasja Sdn Bhd v. Golden Approach Sdn Bhd* [2011] 3 CLJ 751; [2011] 1 MLRA 135 and *Eu Finance Bhd v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 1 MLRA 507; [1982] 2 MLJ 37 to argue that the limitation period provided under the PAPA 1948 had expired and the declaratory order obtained in a suit commenced on 2 March 1989 a nullity.

[54] However, upon reading the wording of the second limb of s. 2(a) of the PAPA 1948, the statutory period of 36 months to commence an action or proceeding against public authorities would start to run from the date the injury or damage ceased, (see para. 71 of the case of *Rosli Dahlan v. Tan Sri Abdul Gani Patail & Ors* [2014] 9 CLJ 225; [2014] MLRHU 349; [2014] 11 MLJ 481).

[55] It is my considered opinion that there was a continuance of damage suffered by the applicant when it was deprived of its fundamental rights in the form of the beneficial interest in the said land as the original proprietor of the said land since the year 1956 and as such the statutory period of 36 months to commence an action or proceeding against public authorities would start to run from the date the injury or damage ceased.

[56] As such, it is my considered view that the applicant is not time barred by second limb under s. 2(a) of the PAPA 1948 as at all material times the applicant has been deprived of its beneficial interest in the said land and the declaratory order obtained in a suit commenced on March 1989 is valid and not a nullity.

[57] Besides, the applicant's present application was in respect of the order of *mandamus* compelling the first to the seventh respondents to comply with the High Court Order dated 29 December 2009. As such, the issue of declaratory order and statutory limitation period of an action commenced in the year 1989 is of no relevance in this present case.

[58] Furthermore, the applicant in their submission in reply (encl. no. 87) submitted that the first respondent expressly pleaded and raised the issue of statutory limitation and failed before the Federal Court both in the Federal Court Appeal No. 01-32-1991 (Federal Court striking out appeal) and the Federal Court review application.

[59] On 10 August 1989, the first respondent had also applied to strike out the High Court Suit under O. 18 r. 19 of the Rules of the High Court 1980 (now the Rules of Court 2012) on the alleged grounds that the action was time barred from bringing the action under s. 2(a) of the PAPA 1948 and/or s. 6(1) and/or s. 9(1) of the Limitation Act 1953 which the first respondent failed in the Federal Court on this same argument.

[60] The first respondent then amended its defence in the High Court suit to delete and abandoned the defence of limitation as seen in para. 5 of the first respondent's statement of defence.

[61] Despite having been unsuccessful in their striking out an application in the High Court on the grounds of limitation and subsequently having abandoned that position, the first respondent again tried to argue limitation in the Federal Court review application but failed as seen in the Federal Court review application.

[62] I view that, as this same material issue has been adjudicated and decided previously by the court of competent jurisdiction, the first respondent and/or his privies are not permitted to litigate the same issue with the rationale being that there should be finality in litigation and that no one should be vexed twice for the same cause or issue. This court is prohibited from determining the same issue as determining this issue would directly be contrary to the doctrine of *res judicata*.

[63] Applying the cases of *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 1 MLRA 611; [1995] 3 MLJ 189; [1995] 3 AMR 2559 and *Orchard Circle Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Ors* [2021] 1 CLJ 1; [2021] 1 MLRA 54; [2021] 1 MLJ 180; [2020] 8 AMR 533, I am of the view that the first respondent is now estopped by

way of the doctrine of estoppel *per rem* judicature from raising the issue of limitation to claim that Order No. 1 in the High Court judgment dated 29 December 2009 is a nullity. Determining this same issue which was previously adjudicated and determined would amount to duplicity of action and a serious waste of court's time.

Statutory Prohibition Under Section 29 Of The Government Proceedings Act 1956

[64] The respondents have also raised the issue of statutory prohibition wherein which the respondents submitted that as the applicant's civil suit falls within the definition of 'civil proceedings' under s. 29(1) of the Government Proceedings Act 1956 (the GPA 1956), their remedies are confined to s. 29(1) of the GPA 1956 of the same.

[65] For ease of reference, s. 29(1) of the GPA 1956 is reproduced below:

> 29(1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require: Provided that:
>
> (a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may *in lieu* thereof make an order declaratory of the rights of the parties; and
>
> (b) *in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof.* (emphasis added)

[66] The respondents in their written submission relied on several cases including *Pemungut Hasil Tanah, Daerah Barat Daya (Balik Pulau), Pulau Pinang v. Kam Gin Paik & Ors* [1983] 1 LNS 37; [1983] 1 MLRA 429; [1983] 2 MLJ 390 where the Federal Court Justice Yeop A Sani (as he then was) held that s. 29 of the Government Proceedings Ordinance 1956 enables the court to make declarations of the rights of parties where one of the parties is the Government.

[67] The respondents submitted that the remedy the applicant sought and secured in their civil suit and which they now seek to enforce in these proceedings is the declaratory order; nothing more. There is simply no question of enforcement or execution of that declaratory order to the effect of actual recovery or delivery of the land.

[68] However, upon perusal of the applicant's present case, I find that the applicant is seeking the enforcement of the High Court Order dated 29 December 2009 to compel the respondents to take and cause all necessary steps to be taken to give effect to that part of the judgment by the learned Judicial Commissioner Puan Zura binti Yahya (as she then was) dated 29 December 2009 *vide* High Court Civil Suit No. S7-21-213-2003; to compel the respondents to transfer and cause to be transferred the said land to the applicant including but not limited to registering the applicant as the proprietor of the said land; to take and cause all necessary steps to be taken to register the applicant as the proprietor of the land; execute and cause to be executed all instruments of transfer necessary to effect a transfer of the land free of encumbrances and liabilities to the applicant.

[69] It is clear that the applicant's application was for the enforcement of the judgment and not only for the declaratory order which was well settled in the High Court Civil Suit No. S7-21-213-2003 that the applicant holds the beneficial interest in the said land that was unlawfully acquired by the respondents.

[70] As such, the applicant is not denied nor refused their rights to claim for an order for *mandamus* and not prohibited under s. 29(1) of the GPA 1956. To deny the applicant the order for *mandamus* would serve a grave injustice for the applicant who has been continuing to suffer damages from not being able to be registered and transferred the said land as to the applicant as the rightful beneficial owner of the said land.

[71] On the facts of the present case, the court order ought to be enforced as the deprivation of the applicant of their rights over the said land as the original proprietor of the said land would defeat the ends of justice when the applicant is denied from having their interest registered in the said land.

[72] From the recent Court of Appeal case of *Semantan* (*supra*) also provided that the applicant rightly has a legal right to compel the performance of the first respondent's public duty under the law to hand possession over the land and/or register the applicant as the proprietor of the said land as to where the first respondent has obtained the possession of the said land illegally or unlawfully, the said land does not vest in the Government/first respondent free from all encumbrances.

Section 8(3) Of The Specific Relief Act (SRA) 1950

[73] Furthermore, the respondents in their submission submitted that the jurisdiction of the court to grant an order of *mandamus* sought by the applicant is curtailed by s. 8(3) of the SRA 1950.

[74] For ease of reference, s. 8 of the SRA 1950 is reproduced below:

Suit by person dispossessed of immovable property

8(1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in the suit.

(2) Nothing in this section shall bar any person from suing to establish his title to any such property and to recover possession thereof.

(3) No suit under this section shall be brought against any Government in Malaysia.

[75] Upon reading s. 8(1) of the SRA 1950, the applicant who is dispossessed without its consent of immovable property may, by suit, recover possession thereof, notwithstanding any other title that may be set up in the suit through s. 8(3) of the SRA 1950 specifically provides that no such suit shall be brought against any Government of Malaysia.

[76] Though s. 8(3) of the SRA 1950 provides for the prohibition of the commencement of any action of dispossession of the land to be brought against any Government of Malaysia, this deprivation directly contradicts the very protection enshrined under art. 13 of the Federal Constitution that takes precedence in this country that no one shall be deprived of property.

[77] The deliberate disobedience of the respondents in not complying with the court order dated 29 December 2009 which was upheld up until Federal Court during the appeal and the review application, and the respondent's contention that s. 8(3) of the SRA 1950 provides for immunity from the commencement of proceedings against them as a government for the dispossession of the said land does not in any way indicate that justice is being served for the applicant who has been deprived of their beneficial interest in the said land due to the unlawful acquisition of the said land by the first respondent.

[78] This is clearly an abuse of the court process as it seems to indicate that the Government of Malaysia is at liberty to cause dispossession of the land from citizens and be protected from any action under s. 8(1) of the SRA 1950 to be commenced against them under s. 8(3) of the SRA 1950. The respondents have also failed to produce any authority to support this proposition.

[79] Besides, this issue was never raised by the first respondents in the said High Court Civil Suit No. S7-21-213-2003 up until the Federal Court regarding the same issue. As such, the respondents should be estopped and barred from raising this issue when it has been adjudicated and determined that the applicant has beneficial interest in the said land that was unlawfully acquired by the first respondent by unlawful means.

A **Breach Of Art. 13 Of The Federal Constitution**

[80] The applicant in their written submission submitted that the respondents' failure to, refusal, and/or neglect to comply and give effect to Order No. 1 of the High Court judgment dated 29 December 2009 tantamount to a breach of art. 13 of the Federal Constitution as the applicant B is deprived from its rights to its property/said land by the respondents' constant disobedience of the law which, more specifically the High Court order dated 29 December 2009.

[81] For ease of reference, art. 13 of the Federal Constitution is reproduced C below:

> **Rights to property**
>
> **(1) No person shall be deprived of property save in accordance with law**
>
> (2) No law shall provide for the compulsory acquisition or use of D property without adequate compensation. (emphasis added)

[82] The applicant's rights to the beneficial interest of the said land are protected under art. 13 of the Federal Constitution and the applicant should not be deprived of their rights over the said land from the constant disobedience of the respondents in not complying and enforcing the High E Court judgment dated 29 December 2009.

[83] This court as the guardian of the Constitution within the terms and structure of the Constitution has a duty to perform in accordance with the oath taken by the judges to uphold the Constitution and act within the F provisions of and in accordance with the law. (Please see the case of *Lim Kit Siang v. Dato' Seri Dr Mahathir Mohamad* [1986] 2 CLJ 441; [1986] CLJ (Rep) 462; [1987] 1 MLJ 383; [1986] 1 MLRH 113).

[84] David Wong Dak Wah J (as he then was) in para. 35 in the case of *Hock Huat Chan Sdn Bhd v. Assan Mohammad & Ors* [2008] 4 CLJ 512; [2008] G 1 MLRH 634; also held as follows:

> [35] Let me say that I am fully aware of the argument that the issues posed by me should not be considered as they had not been pleaded by the plaintiff. As a retort, I can do no better than to refer what Lord Nicholls of Birkenhead and Lord Hope of Craighead in *Prince Pinder v. The* H *Queen* [2002] UKPC 46 said:
>
> *(It) should never be forgotten that courts are the guardian of constitutional rights.* A vitally important function of courts is to *interpret constitutional provisions conferring rights with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford. Provisos derogating from the scope of guaranteed rights are to be read restrictively.* In the ordinary course they are I to be given strict and narrow, rather than broad, construction: see *State v. Petrus* per Aguda JA in the Court of Appeal of Botswana, applied by their Lordships' Board in *R v. Hughes*. (emphasis added)

[85] Based on the abovementioned case, it is clear and undisputed that this court plays a vital role in interpreting constitutional provisions conferring rights to the applicant with the fullness needed to ensure that the applicant as a citizen have the benefit these constitutional guarantees are intended to afford.

[86] As such, this court as the guardian of the Federal Constitution would only be seen as upholding the Constitution when the applicant's application is allowed for the order of *mandamus* against the respondents to perform their duties under the High Court judgment dated 29 December 2009. If the court denies the applicant's rights to the order of *mandamus*, then the rights to the property provided under art. 13 of the Federal Constitution would be meaningless.

[87] However, the applicant would not be said to have been denied her rights under art. 13 of the Federal Constitution when there is adequate compensation that would be ordered in favour of the applicant for the unlawful possession of the said land.

Private Law And Public Law Dichotomy

[88] The respondents have also raised the issue of public law and private law dichotomy in their written submission in that the applicant cannot seek to enforce Order No. 1 of the High Court judgment dated 29 December 2009 by way of judicial review application which is a public law remedy.

[89] However, this argument is misconceived in fact as whilst the High Court Civil Suit No. 213 may have been in respect of a trespass action, the order of *mandamus* arises out of the High Court judgment dated 29 December 2009 and involves the public duty of the respondents to observe, honour and give effect to the judgments made by this very court of competent jurisdiction.

[90] One must note that the court has the discretion to grant an order of *mandamus* in cases where judicial review application have been commenced against the Government agencies or public bodies involving public law element in failing to comply with the court judgments. (Refer to the cases of *Tang Hak Ju v. Ketua Menteri Negeri Pulau Pinang & Ors* [2010] 1 CLJ 993; [2009] 3 MLRA 271; [2010] 1 MLJ 319; *Dewan Perniagaan Melayu, Malaysia Negeri Johor v. Menteri Besar Johor & Ors* [2017] 10 CLJ 632; [2016] 7 MLJ 1; [2017] MLRHU 375; [2017] 4 AMR 434; and *Indira Ghandhi Mutho v. Ketua Polis Negara* [2016] 5 CLJ 353; [2016] 3 MLJ 141; [2016] 3 MLRA 356; [2016] 3 AMR 521.

[91] It is to be noted that the respondents being the Government and Minister hold power in trust for and act as fiduciaries of the public. If these powers are abused and misused, then in the interest of justice this court can intervene.

[92] Whilst the action resulting from the High Court judgment arose from a civil suit of trespass and not judicial review, the High Court judgment dated 29 December 2009 can be compared to the warrant of committal issued by the High Court (being an 'order' of the court).

[93] As such, if these orders were not given effect to, there is a challenge to the administration of justice, allowing *mandamus* to issue to the parties who should give effect to the said judgment/order. (Please see the cases of *Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal* [2020] 1 CLJ 337; [2019] 6 MLRA 432; [2019] 12 MLJ 1; [2019] 8 AMR 325 and *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169; [2005] 1 MLRA 819; [2005] 6 MLJ 289; [2005] 5 AMR 629.

Concurrent Statutory Remedy

[94] The applicant concurrent to the filing of this present judicial review application, has also filed Originating Summons No. WA-24NCVC-301-02-2017 against the seventh respondent based on s. 417 of the National Land Code (NLC) and seeks to enforce the declaratory order which is the same subject matter.

[95] The respondents contend that the originating summons is essentially to achieve the same intended for which the order of *mandamus* is sought. Having opted to enforce the declaratory order *vide* a statutory provision against the seventh respondent (not to be taken as a concession on the part of the seventh respondent there), the applicant's application for judicial review is redundant more so considering that the purpose is the same.

[96] The respondents also further submitted that the applicant has by their own election sought a concurrent recourse *vide* s. 417 of the NLC and having done that the option of simultaneously seeking an order for *mandamus* is not available to them. (Please refer to the cases of *Semantan No. 2* (*supra*); *Lee Mok Lan (f) v. Registrar Of Titles, Selangor* [1955] 1 LNS 48; [1955] 1 MLJ 97; [1995] 1 MLRH 601; *Government Of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110; [1987] 2 MLJ 185; [1986] 1 MLRA 207; and *Chin Mee Keong & Ors v. Pesuruhjaya Sukan* [2007] 5 CLJ 363; [2007] 2 MLRA 1; [2007] 6 MLJ 193). The respondents further contend that it was an abuse of the court process for the applicant to apply for judicial review to obtain the order for *mandamus*.

[97] For ease of reference s. 417 of the NLC is produced below:

417 General authority of the Court

(1) The Court or a Judge may by order direct the Registrar or any Land Administrator to do all such things as may be necessary to give effect to any judgement or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Land Administrator to comply with the order forthwith.

(2) Where, pursuant to any order made by virtue of this section, the Registrar or any Land Administrator:

(a) cancels any instrument relating to land, or any memorial or other entry on any such instrument, or

(b) makes any other amendment of, or addition, to, any such instrument, he shall note thereon the reason for the cancellation, amendment or addition, and the date thereof, and shall authenticate the same by his signature and seal.

(3) Where the Registrar or land Administrator takes action under this section in respect of any land or any share or interest therein, he shall cause notice of his action to be served upon any person or body having a claim protected by caveat affecting the land, share or interest. (emphasis added)

[98] From the reading of s. 417(1) of the NLC, this court may by order direct the Registrar or any Land Administrator to do all such things as may be necessary to give effect to the High Court judgment or order given dated 29 December 2009 in the High Court Civil Suit No. S7-21-213-2003 relating to the said land, and it shall be the duty of the Registrar or Land Administrator to comply with the order forthwith.

Judicial Discretion

[99] It is to be noted that the present case involves the dispute in respect of the possession of the said land (an immovable property) that are generally unique in nature and *mandamus* order must be exercised judiciously and responsibly as propounded by the Court of Appeal in the case of *The State Minerals Management Authority, Sarawak & Ors v. Gegah Optima Resources Sdn Bhd* [2020] 6 CLJ 279; [2020] MLJU 570; [2020] MLRAU 119. In discussing the power of the court in s. 25(4) of the CJA 1964 to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose, Mary Lim JCA (now FCJ) stated that "such supervisory powers must be exercised judiciously and responsibly."

[100] It is to be borne in mind that the issue of an order of *mandamus* is strictly a matter of discretion of the court. To ascertain whether it is proper or not to grant the remedy, the court is entitled to take into consideration not only the conduct of the applicant but also all the surrounding circumstances of the present case.

[101] Taking into account the surrounding circumstances in the present case, it is in the interest of justice that registering the applicant as the proprietor of the said land having possession of the said land as the original proprietor

would not meet the ends of justice taking into account that the said land has been acquired to develop a diplomatic enclave which has benefited the public at an enormous rate.

[102] Based on this, the court order dated 19 December 2009 compelling the first to the seventh respondents to register, prepare, change, cancel, delete, correct and/or amend the relevant register document(s) of title, issuing document(s) of title or any other register or instrument relating to the land, including any memorial or entry in the relevant register of titles and documents to vest the registered proprietorship in the land free of encumbrances in the name of the applicant would cause undue hardship to the respondents which compensation may be insufficient.

[103] Even though it appears that a legally *mandamu*s order may be granted, this case requires further consideration that has to be carefully made by this court. What will happen to all the said land that has been substantially developed over the years if the *mandamus* order is granted.

[104] If the applicant is allowed to register the beneficial interest as well as a proprietor of the said land that they are entitled to possess from the first respondent, then the development of the said land as a diplomatic enclave would stand frustrated. If the applicant asserts its rights as the registered proprietor of the said land having possession of the same, then it would greatly affect the development of the said land and further cause the enormous loss of public money.

[105] Therefore, I am of the considered opinion that this case will not be an appropriate case and situation where a *mandamus* order can be granted. Justice is far beyond what the applicant is seeking for. This case needs to be determined in a bigger picture and realistically because it involves the public who had already acquired their property legally.

[106] I am of the view that reinstating the beneficial interest as well as the possession of the applicant in the said land would be unfair to the respondents taking into account that the said land has been substantially developed. Reinstating the proprietorship of the said land to the applicant would cause a grave injustice to the respondents.

Conclusion

[107] Upon considering both party's submission and the authorities put forth before the court, and after taking into consideration not only the conduct of the applicant in filing this present application and also the Originating Summons No. WA-24NCVC-301-02-2017 against the seventh respondent based on s. 417 of the NLC and seeks to enforce the declaratory order which is the same subject matter but also all the surrounding circumstances, it is not just and right that the applicant's application under encl. no. 1 is allowed.

[108] To answer the core issue as to whether a *mandamus* order may be granted against the respondents in order to compel them to comply with the High Court order dated 29 December 2009 as in the High Court Civil Suit No. S7-21-213-2003, it is my considered opinion that this court shall not grant a *mandamu*s order to compel the respondents to materialise those extensive reliefs which the applicant prays for as this is an impossible task for the respondents to perform as those said land had already been developed.

[109] I am of the view that having opted to enforce the declaratory order *vide* a statutory provision against the seventh respondent, the applicant's application for judicial review is redundant more so considering that the purpose is the same.

[110] Based on the above reasoning, the applicant's application (encl. 17) is hereby dismissed with no order as to costs.